SANITIZED DECISION – 04-052 B(Rmd) – BY GEORGE V. PIPER, ALJ – SUBMITTED for DECISION on JUNE 8, 2006 – ISSUED on OCTOBER 23, 2006

SYNOPSIS

BUSINESS AND OCCUPATION TAX -- WATER UTILITY – STATUTORY CHANGE EFFECTIVE PROSPECTIVELY ONLY -- The 2005 legislative amendment to W. Va. Code § 11-13-3, adding a new subdivision (b)(7), which explicitly exempted, for the first time, gross income of a nonprofit homeowners' association received from assessments on its members for community services such as road maintenance, common area maintenance, water, sewage service and security service, is not to be applied retroactively, and did not, therefore, exempt, retroactively, the Petitioner, who was previously determined not to be exempt under W. Va. Code § 11-13-3 (b)(3), because the homeowners' association was not a fraternal association and did not operate for the exclusive benefit of its members. *See, e.g.,* W.Va. Code § 2-2-10 (bb) [1998] and syl. pt. 3, *Findley v. State Farm Mut. Auto Ins. Co.*, 213 W. Va. 80, 576 S.E. 2d 807 (2002), *cert. denied*, 539 U.S. 942 (2003). Moreover, tax exemption statutes are strictly construed against the taxpayer. *See* syl. pt. 5, *C B & T Operations Co. v. Tax Comm'r, 211 W. Va. 198, 564 S.E. 2d 408 (2002).*

BUSINESS AND OCCUPATION TAX -- WATER UTILITY – GIVING EFFECT TO SEPARATE CORPORATE STATUS OF NON-MEMBER OF ASSOCIATION -- Petitioner may not properly claim that a wholly owned subsidiary, a non-member, and the parent company, a member, are, for tax purposes (W. Va. Code § 11-13-3 (b)(3)) one corporate entity (a member) where the corporations kept separate books and billings, made a loan from one to the other, and otherwise conducted different businesses. Tax exemption statutes are strictly construed against the taxpayer.

FINAL DECISION
ON REMAND FROM CIRCUIT COURT

By a Final Decision issued on January 18, 2005, in our Docket No. 04-052 B, this independent state tax tribunal upheld, for the last three years thereof, the West Virginia business and occupation tax assessment issued against the Petitioner by the Respondent West Virginia State Tax Commissioner, for the period of May 1, 1998 through April 30, 2003. The primary holding of this tribunal in that matter was that the Petitioner was not entitled to the exemption set forth now in W. Va. Code § 11-13-3(b)(3) [2005], because the Petitioner's homeowners' association was not a fraternal association operated exclusively for the benefit of its members.

The Petitioner subsequently appealed our decision timely to the Circuit Court of _____ County, West Virginia.

On September 28, 2005, the Honorable Judge of the Circuit Court of _____ County, West Virginia ("the circuit court"), granted the motion of the Petitioner for leave to supplement the record with information disclosing the amount of water utility bills paid by the non-members of the Petitioner. ("Association") and an apportionment as to the West Virginia business and occupation tax ("B & O tax") assessment corresponding with these non-members, despite the noted objection of the Respondent Tax Commissioner to that motion.

In regard to that motion, the circuit court opined that:

"1. The existence of the non-members (individuals and an entity which the Petitioner claimed were members but whom did not exercise any meaningful vote in Association affairs) was at the central focal point of the Respondent's assessment and a reason cited for rejecting Petitioner's argument that it was exempt from B & O Tax.

"2. Subsequent to the filing of the Petition (on July 8, 2005,) new legislation has gone into effect which may render the matter of future payments of B & O Tax moot, except as to certain non-members.

"3. Petitioner wishes to pursue the alternative theory that its liability for back taxes is limited to tax on gross receipts from the non-members.

"4. In this regard, Petitioner intends to advance the theory that the legislative amendments merely clarified what was always intended, that it pay B & O Tax as would a natural person, only on gross receipts of monies coming from other entities and individuals in the course of a business activity, and not on monies which a natural person would make available to himself earned from non-business activities.

"5. While it is anticipated that the Respondent will not agree with Petitioner's version of the statutory amendments, Petitioner should be permitted to fully pursue and argue its theory.

"6. However, this Court finds that it would better suit this administrative process for consideration of Petitioner's argument to be given by the Administrative Law Judge rather than for the Court to reopen the matter which is now on appeal.

"Therefore, in consideration of the fact that the law has changed since the time of the proceedings before the ALJ, this matter is **REMANDED** back to the ALJ for the taking of such additional evidence as is proffered by Petitioner in its Motion and for any appropriate application of the new law to the facts of this case."

Subsequently, notice of a hearing concerning this remand order of the circuit court was sent to the parties, and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and W. Va. Code St. R. § 121-1-61.3.3 (Apr. 20, 2003).

FINDINGS OF FACT

1. Member 1, a West Virginia corporation, has a wholly owned subsidiary known as Company A, which operates a restaurant on the grounds of The Resort. This entity is one of the customers which is the subject of the remand order.

2. Member 1 is a member of the Petitioner, in that it owns real estate at The Resort and is, therefore, entitled to vote like any other voting member.

3. Member 1 does sometimes exercise its right to vote on matters such as annexations; however, it chooses not to elect members to Petitioner's board of directors, for it believes that directors should only be chosen by homeowners.

4. Member 1's current Chairman of the Board testified that although it rarely even votes present at annual meetings, it could, if it wanted to, control all elections because it has enough votes or controls enough votes to determine any outcome.

5. Member 1 owns the real estate upon which Company A is situated, while it (Company A) owns and operates only personal property.

6. Petitioner sends separate water bills to Company A, The Resort, and to Member 1 for the water service that it provides to each entity.

7. Company A pays no rent, royalties or licensing fees to Member 1; however, Member 1 loans money periodically to Company A, to financially assist in those years when it loses money, and Company A endeavors to repay same when it is able to do so.

8. Member 1's Chairman of the Board testified that when Member 1's employees eat lunch at Company A, Member 1 is billed for those services by Company A.

9. Member 1's Chairman of the Board also testified that the fact that Company A is not a member of the Petitioner is of no consequence because Member 1, as the voting member, for all intents and purposes, owns and controls Company A, and that any distinction is purely that of semantics.

10. At the evidentiary hearing after remand from the circuit court, Petitioner's office manager testified and submitted documentation in support thereof, as to the quarterly billings for water service provided to Company A as well as to the five (5) non-voting lot members of Petitioner's homeowners association during the assessment period.

11. At the conclusion of the hearing on remand, Respondent's counsel agreed to have the record stand on the testimony of Petitioner's witness, the Past President, that the five (5) non-voting lot owners had historically petitioned for inclusion and that Petitioner's Board of Directors had accepted all into Petitioner prior to the assessment period in question.

DISCUSSION

The first issue to be decided based upon the remand order is whether a legislative change, after the assessment period, which now includes an explicit exemption from West Virginia business and occupation tax for certain gross income of homeowner associations, codified what the law always was, as argued by Petitioner, or was the creation of a new, prospective exemption for this gross income of homeowners' associations, as argued by Respondent.

In 2005, W. Va. Code § 11-13-3 was amended by adding an entirely new subdivision (b)(7), to exempt "gross income of a nonprofit homeowners' association received from assessments on its members for community services such as road maintenance, common area maintenance, water service, sewage service and security service."

The note included with Senate Bill No. 646, which was the original bill introduced prior to the Committee Substitute for Senate Bill No. 646, stated:

> NOTE: The purpose of this bill is to exclude from the business and occupation tax, the proceeds of assessments made pursuant to the declarations or covenants of nonprofit homeowners associations, organized under the laws of this state, which are received from homeowner association members for the purpose of providing community services such as road maintenance, water and sewerage service, security and the like.

Importantly, this new subdivision (b)(7) enacted in the year 2005 by the West Virginia Legislature clearly did not alter, replace, or amend W. Va. Code § 11-13-3(b)(3), which Petitioner relied upon at the first hearing and which we rejected because the term "fraternal" modified all three of the terms, "societies," "organizations," and "associations," and not just "societies," the first word listed, as was argued by Petitioner. Additionally, the

fact remains that Petitioner did not operate for the exclusive benefit of its members, because water service was provided to and billed to a non-member of the Petitioner, that being Company A.

Again, it is important that there is nothing in the language of the amendment in question to clearly show that the Legislature intended the amendment to be a "retroactive clarification." If the Legislature had intended the amendment to be a clarification, it could easily have indicated its intention. For example, in 2002, the Legislature amended W. Va. Code § 33-6-30, in response to the decision in *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (2000). The amendment contained the following language:

> It is the intent of the Legislature that the amendments in this section enacted during the regular session of two thousand two are: (1) A clarification of existing law as previously enacted by the Legislature, including, but not limited to, the provisions of subsection (k), section thirty-one of this article; and, (2) specifically intended to clarify the law and correct a misinterpretation and misapplication of the law that was expressed in the holding of the Supreme Court of Appeals of West Virginia in the case of *Mitchell v. Broadnax*, 208 W. Va. 36, 537 S.E.2d 882 (W. Va. 2000). These amendments are a clarification of the existing law as previously enacted by this Legislature.

The amendment in *Broadnax* clearly demonstrated that the Legislature wanted to "clarify" the previously enacted statute. The 2005 amendment to W. Va. Code § 11-13-3 contains no such clear expression of legislative intent. It speaks neither to clarifying existing law as previously enacted, nor to clarifying the law and correcting a misapplication thereof by the Tax Commissioner.[1]

In *Van Nuis v. Los Angeles Soap Co.*, 36 Cal. App. 3d 222, 228, 111 Cal. Rptr. 398, 402 (1973), the California Court of Appeals articulated the rule respecting amendments to statutes:

> The cardinal rule of statutory construction is that the intention of the Legislature must be ascertained and given effect. [Cites omitted.] An intention to change the law is indicated by a material change in the language of a statute. [Cite omitted.] '"The very fact that the prior act is amended demonstrates the intent to change the pre-existing law, and the presumption must

[1] In *Findley v. State Farm Mut. Auto. Ins. Co.*, *infra*, the Court held that the use of even this language did not entitle the statute to retroactive application.

> be that it was intended to change the statute in all the particulars touching which we find a material change in the language of the act."' [Cites omitted.]

Id. at 228, 111 Cal. Rptr. at 402. This statement articulates the most logical approach to legislative amendments. The Legislature's obvious intent to change the statute is evidenced by its adding materially new statutory language in a new subdivision. If the Legislature did not intend to amend the statute, but instead intended to merely "clarify" the statute, it would have articulated its intention in that respect. It did not.

Even if the Legislature had clearly stated an intention to clarify the statute because of an erroneous interpretation, the clarification would still be entitled ordinarily to only a prospective application.

> 'The usual purpose of a special interpretive statute is to correct a judicial interpretation of a prior law which the legislature considers inaccurate. Where such statutes are given any effect, the effect is prospective only. Any other result would make the legislature a court of last resort.' 1A *Sutherland on Statutory Construction* § 27.4, at 632-33 (6th ed. 2002 rev.)

Findley v. State Farm Mut. Auto. Ins. Co., 213 W. Va. at 96 n. 16, 576 S.E.2d at 817 n. 16 (2002), *cert. denied*, 539 U.S. 942 (2003). Applying this principle of law, even if the amendment was merely a clarification intended to put into effect that which the Legislature intended in the first place, it is entitled only to prospective application.

Any conclusion that this "clarification" was "retroactive," is also clearly contrary to the express provisions of W. Va. Code § 2-2-10(bb) [1998], which provides, "A statute is presumed to be prospective in its operation unless expressly made retrospective." The Supreme Court has consistently held that a statute is presumed to be prospective in its application, unless the Legislature clearly sets forth its intent otherwise. This intention on the part of the Legislature must be shown by "clear, strong and imperative words or by necessary implication." Syl. pt. 3, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002), *cert denied*, 539 U.S. 942 (2003); *Gallant v. Jefferson Co. Comm.*, 212 W. Va. 612; 618, 575 S.E.2d 222, 228 (2002); Syl. pt. 3, *Conley v. Workers' Comp. Div.*, 199

W. Va. 196; 483 S.E.2d 542 (1997); *Public Citizen, Inc. v. First Nat'l Bank*, 198 W. Va. 329, 335, 480 S.E.2d 538, 544 (1996); Syl. pt. 1, *Myers v. Morgantown Health Care Corp.*, 189 W. Va. 647, 434 S.E.2d 7 (1993); Syl. pt. 4, *Arnold v. Turek*, 185 W. Va. 400, 407 S.E.2d 706 (1991); Syl. pt. 2, *State ex rel. Manchin v. Lively,* 170 W. Va. 672, 295 S.E.2d 912 (1982); Syl. pt. 3, *Shanholtz v. Monongahela Power Co.*, 165 W. Va. 305, 270 S.E.2d 178 (1980 *State v. Bannister*, 162 W. Va. 447, 453, 250 S.E.2d 53, 57 (1978); Syl. pt. 1, *Loveless v. Workmen's Compensation Comm'r*, 155 W. Va. 264, 184 S.E.2d 127 (1971); Syl. pt. 1, *Roderick v. Hough*, 146 W. Va. 741, 124 S.E.2d 703 (1961); Syl. pt. 4, *Taylor v. State Compensation Comm'r*, 140 W. Va. 572, 86 S.E.2d 114 (1955); *State ex rel. Conley v. Pennybacker*, 131 W. Va. 442, 446, 48 S.E.2d 9, 11 (1948); *Lester v. State Compensation Comm'r*, 123 W. Va. 516, 520, 16 S.E.2d 920, 924 (1941); *Jenkins v. Heaberlin*, 107 W. Va. 287, 288-289, 148 S.E. 117, __ (1929); *Fairmont Wall Plaster Co. v. Nuzum*, 85 W. Va. 667, 672, 102 S.E. 494, 496 (1920); *Morris v. Westerman*, 79 W. Va. 502, 516, 92 S.E. 567, 573 (1917); Syl. pt. 2, *Harrison v. Harman*, 76 W. Va. 412, 85 S.E. 646 (1915); Syl pt. 1, *Thomas v. Higgs & Calderwood*, 68 W. Va. 152, 69 S.E. 654 (1910); Syl. pt. 3, *Barker v. Hinton*, 62 W. Va. 639, 59 S.E. 614 (1907); Syl. pt. 2, *Burns v. Hays*, 44 W. Va. 503, 30 S.E. 101 (1898); *Walker v. Burgess*, 44 W. Va. 399, 400, 30 S.E. 99, 100 (1898); *Casto v. Greer*, 44 W. Va. 332, 334, 30 S.E. 100, 101 (1898); Syl. pt. 3, *Rogers v. Lynch*, 44 W. Va. 94, 29 S.E. 507 (1897); Syl. pt. 5, *State v. Mines*, 38 W. Va. 125, 18 S.E. 470 (1893); and Syl. pt. 3, *Stewart v. Vandervort*, 34 W. Va. 524, 12 S.E. 736 (1890).

Nothing in the 2005 amendment to W. Va. Code § 11-13-3 constitutes "clear, strong and imperative words" evidencing a legislative intent that the statute operate retroactively. In fact, the amendment is totally silent with regard to retroactivity. As is the case here, in the

absence of clear, strong and imperative words to the contrary, the statute must be applied prospectively, unless it is retroactive by "necessary implication."

In considering whether there exists a "necessary implication" that the statute is to be given retroactive operation, the West Virginia Supreme Court of Appeals has said that legislative intent to give the statute retroactive application must be "necessarily implied from the language of the statute which would be inoperative if not given retroactive force and effect." *Peak v. State Compensation Comm'r*, 141 W. Va. 453, 91 S.E.2d 625 (1956); *State ex rel. Conley* v. *Pennybacker*, *supra*; *Lester* v. *State Compensation Comm'r*, *supra*; *Fairmont Wall Plaster Company* v. *Nuzum*, *supra*; *Harrison* v. *Harman*, *supra*; *Barker* v. *Hinton*, *supra*; *Burns* v. *Hays*, *supra*; *Walker* v. *Burgess*, *supra*; *Casto* v. *Greer*, *supra*; *Rogers* v. *Lynch*, *supra*; *State* v. *Mines*, *supra*; *Stewart* v. *Vandervort*, *supra*. As stated in *Harrison* v. *Harman*, *supra*:

> 'Every reasonable doubt is resolved against a retroactive operation of the statute.' *Stewart v. Vandervort*, 34 W. Va. 524, 530, 12 S.E. 736. 'Words in a statute ought not to have a retrospective operation unless they are so clear, strong and imperative that no other meaning can be annexed to them, or unless the intention of the legislature cannot be otherwise satisfied.' *U. S.* v. *Heth*, 3 Crauch. 413; *Chew Heong* v. *U. S.*, 112 U.S. 536, 28 L. Ed. 770, 5 S. Ct. 255. To put retroaction into a statute by implication, the language must be such that it cannot operate at all otherwise than retrospectively. *State* v. *Mines*, 38 W. Va. 125, 18 S.E. 470; *Casto* v. *Greer*, 44 W. Va. 332, 30 S.E. 100. *Every word in this act can operate otherwise*. (Emphasis added.)

Nothing in the language of W. Va. Code § 11-13-3, as amended in 2005, gives any indication that it would somehow be rendered inoperative if it were not given retroactive application. Every word in the 2005 amendment can operate prospectively. The language is not such that it cannot operate at all otherwise than retrospectively. Stated differently, the statute operates as well prospectively as retroactively. In fact, a prospective application makes more sense, since it does not undo past transactions. It is not enough that the language is general enough to cover past transactions to justify a retroactive construction. Every

reasonable doubt is resolved against a retroactive operation of the statute. *Stewart* v. *Vandervort, supra*.

Moreover, if the statute, as a whole, is, somehow, viewed as ambiguous, "where a person claims an exemption from a law imposing a license or tax, such law is strictly construed against the person claiming the exemption." Syl. pt. 5, *CB&T Operations Co. v. Tax Comm'r,* 211 W. Va. 198, 564 S. E. 2d 408 *(2002) (internal quote marks and citations omitted).*

Accordingly, this tribunal concludes that the new W.Va. Code § 11-13-3(b)(7) [2005] did not codify existing law, and was not legislatively intended to apply retroactively, but rather was added to exempt, prospectively, for the first time, from the West Virginia business and occupation tax, the sale of water services, which is the subject of these proceedings.

The second issue to be decided is whether our conclusion that the sale of water by the Petitioner as a non-fraternal association to a non-member, which precluded the exemption in §11-13-3(b)(3), is incorrect because Member 1 and Company A are essentially one and the same, in that Company A is a wholly owned subsidiary of Member 1, which is a voting member of Petitioner.

To that end, Member 1 current Chairman of the Board testified that there is common ownership between the two corporations, and that no charge for rent, royalties or licensing fees to Member 1 is paid.

However, the record shows that Company A. is a separately registered corporation from Member 1 and is engaged in a separate business activity: Company A operates a resort, golf course, and restaurant, while Member 1 is a real estate developer.

Of particular significance is the fact that Petitioner bills each for water service, and separate accounts are maintained for bookkeeping purposes. Additionally, loans are made

from Member 1 to Company A and repaid when possible, and when Member 1's employees eat lunch at Company A, Member 1 is billed for these services (meals).

Petitioner's response is that Company A is merely paying a water bill for property owned by Member 1; however, that flies in the face of the indisputable fact that Company A, and not Member 1, is using the water provided by Petitioner.

Accordingly, it is determined that, for tax and all other purposes, Member 1 and Company A are separate corporations, one of which is a member of Petitioner and the other is not, and to consider these two (2) corporations as one for purposes of the exemption in W. Va. Code § 11-13-3(b)(3) would, again, not strictly construe the exemption against the one seeking to claim the exemption. *See, e.g., State ex rel. Hardesty v. Aracoma,* 147 W. Va. 645, 649, 129 S.E. 2d 921, 924 (1963).

In summary, because this tribunal concludes that the Petitioner may neither avail itself of the exemption set forth in W. Va. Code § 11-13-3(b)(3), nor the new amendment contained in W. Va. Code § 11-13-3(b)(7) under any theory of retroactive application, the Petitioner may not properly pay the West Virginia business and occupation tax merely upon its sale of water to the non-member, Company A, because an apportionment under W. Va. Code § 11-13-3(b)(3) is not permissible.

CONCLUSIONS OF LAW

Based upon all of the above it is **HELD** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon a petitioner-taxpayer, to show that the assessment

is incorrect and contrary to law, in whole or in part. *See* W. Va. Code § 11-10A-10(e) [2002] and W. Va. Code St. R. § 121-1-63.1 (Apr. 20, 2003).

2. The Petitioner-taxpayer in this matter has failed to carry the burden of proof with respect to the issue of whether it, as a public utility, should be exempt from the West Virginia business and occupation tax. *See* W. Va. Code St. R. § 121-1-69.2 (Apr. 20, 2003).

3. The Petitioner-taxpayer has also failed to carry its burden of proof as to its contention that a subsequent legislative amendment to W. Va. Code § 11-13-3 applies retroactively to the Petitioner during the assessment period.

4. The Petitioner-taxpayer has also failed to carry its burden of proof as to its contention that the non-membership status of Company A should be disregarded because it is a subsidiary of a member of the Petitioner.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the West Virginia business and occupation tax assessment issued against the Petitioner for the modified period of May 1, 2000 through April 30, 2003, for tax of $, interest of $, and no additions to tax, **totaling $**, should be and is hereby **AFFIRMED** again, as per our initial Decision in this matter.